DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. ICE CREAM "N" STUFF & PIZZA and RAMINDER KAUR Respondents	Case No.: I-00-70167 I-00-70143

FINAL ORDER

I. Introduction

On October 31, 2001, the Government served a Notice of Infraction upon Respondents Ice Cream "N" Stuff & Pizza and Raminder Kaur, alleging that they violated 23 DCMR 3012.2, which requires operators of restaurants, delicatessens or catering businesses to report the infestation of rats or vermin to the Director of the Department of Health. In describing the nature of the infraction, however, the Notice of Infraction states: "Failure to keep premises free of rodents," indicating that the inspector may have intended to charge a violation of 23 DCMR 3012.1, which requires operators of the designated food establishments to take all necessary precautions to keep the premises free from rats and vermin. The Notice of Infraction alleged that the violation occurred on October 24, 2001 at 1500-04 Benning Road, N.E. and sought a fine of $1,000.

Respondents did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Official Code §§ 2-1802.02(e), 2-1802.05). Accordingly, on November 30, 2001, this

administrative court issued an order finding Respondents in default and subject to the statutory penalty of $1,000 required by D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f). The order also required the Government to serve a second Notice of Infraction.

The Government served a second Notice of Infraction of December 7, 2001. Respondents then filed a plea of Admit with Explanation, together with a request for suspension or reduction of the fine and penalty. On December 21, 2001, I issued an order permitting the Government to reply to that request. The Government has elected not to file any reply.

By pleading Admit with Explanation, Respondents have waived any defects in the Notices of Infraction. *DOH v. Multi-Therapeutic Services, Inc.*, OAH No. I-00-40335 at 3 (Final Order, October 29, 2001). Thus, the Government's erroneous citation of 23 DCMR 3012.2, when it apparently intended to charge a violation of 23 DCMR 3012.1, is of no consequence. *See Multi-Therapeutic, supra.* Respondents have treated this case as if it were brought under § 3012.1, and the Government has not objected. The applicable fines for violating both § 3012.1 and § 3012.2 are the same. 16 DCMR 3216.1(o) and (p). As neither party will be prejudiced, this case will be decided under § 3012.1.

II. Summary of the Evidence

Respondents state that they keep their store clean and that they have monthly pest control service. They also assert that their store is located near a dumpster that apparently services the entire mall where they are located and attracts rats. They state that they have spoken with the mall owner and encouraged it to arrange for pest control treatment for the area near the dumpster. They state that they did not file a response to the first Notice of Infraction because Mr. Kaur, the store manager, spoke with the inspector after issuance of the Notice of Infraction.

According to Mr. Kaur, the inspector told him that he could respond to the Notice of Infraction and request a suspension or reduction of the fine by appearing on the pre-scheduled date listed on the Notice of Infraction. He also states that, after receiving the November 30 order, he realized that this advice was erroneous and promptly filed his plea. The Government has not disputed these claims.

III. Findings of Fact

Respondents' plea of Admit with Explanation establishes that they did not take all necessary precautions to keep their food establishment free from rats and vermin on October 24, 2001. Respondents have undertaken good faith efforts to comply with the rule, both by keeping their establishment clean and by hiring a pest control company. Respondents also have accepted responsibility for the violation. Respondent Ice Cream "N" Stuff previously has been found liable for violating § 3012.1. *DOH v. Ice Cream & Stuff*, OAH No. I-00-70208 (Final Order, May 17, 2002).

The unrefuted evidence establishes that the inspector who issued the Notice of Infraction advised Respondents that they could respond to the Notice of Infraction by appearing on the pre-scheduled hearing date.

IV. Conclusions of Law

The rule at issue provides:

> All persons engaged in the operation of any restaurant, delicatessen, or catering business shall be required to take all necessary precautions to keep the premises free from rats and vermin.

23 DCMR 3012.1.

Respondents' plea of Admit with Explanation establishes that they violated § 3012.1. A violation of § 3012.1 is a Class 1 infraction, punishable by a fine of $1,000 for a first offense. 16 DCMR 3216.1(o); 16 DCMR 3201. Respondents' effort to comply with the rule and their acceptance of responsibility warrant a reduction in the fine amount, and I will impose a fine of $675.

The Civil Infractions Act, D.C. Official Code §§ 2-1802.02(f) and 2-1802.05, requires the recipient of a Notice of Infraction to demonstrate "good cause" for failing to answer it within 20 days of the date of service by mail. If a party does not make such a showing, the statute requires that a penalty equal to the amount of the proposed fine must be imposed. D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f). Respondents' failure to file a timely answer resulted from their reliance upon erroneous advice from the inspector. Previous cases have held that a respondent's reliance upon erroneous advice about how to answer from an inspector (or other Government employee with responsibility in civil infraction matters) constitutes good cause, if the respondent acts promptly after learning of the error. *DOH v. Texaco Service Station*, OAH No. I-00-20126 at 2-3 (Final Order, October 26, 2000); *DOH v. Rolyn Companies*, OAH No. I-00-10325 at 5-6 (Final Order, October 18, 2000). That rule is applicable here, as Respondents filed their plea less than two weeks after issuance of the November 30 Order informing them of their obligation. Consequently, the statutory penalty for not filing a timely answer will not be imposed.

V. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2002:

ORDERED, that Respondents shall pay a total of **SIX HUNDRED SEVENTY-FIVE DOLLARS ($675)** in accordance with the attached instructions within twenty (20) calendar days of the mailing date of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondents fail to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting from the date of this Order, pursuant to D.C. Official Code § 2-1802.03 (i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondents pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondents' business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

FILED 08/05/02

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John P. Dean
Administrative Judge